

DOCKET FILE COPY ORIGINAL

RECEIVED

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUN - 7 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY 7

SUMMARY

The Bureau supports dismissal of Glendale's application based on the showing made by Trinity.

If it is determined that dismissal of Glendale's application is not warranted, the Bureau supports addition of issues to determine: (a) whether Glendale is financially qualified; (b) whether Glendale violated Sections 1.65 and 73.3514(a) of the Commission's Rules; and (c) whether Raystay Corporation, which was controlled by the same individual who controls Glendale, misrepresented facts to the Commission in four LPTV applications and requests for extensions of time to construct the stations.

TABLE OF CONTENTS

	<u>Page</u>
Summary	i
Table of Contents	ii
Introduction	1
The Pleadings	1
Motion to Dismiss	1
Contingent Petition to Enlarge Issues	3
Character Issue	5
Site Availability/Site Certification Issues	7
Financial Certification Issue	7
Reporting Violations Issue	8
Raystay Misrepresentation Issue	11
Rehabilitation Submission Issues	13
Construction Issue	13
Discussion	14
Motion to Dismiss	14
Contingent Petition to Enlarge Issues	16
Character Issue	16
Site Availability/Site Certification Issues	17
Financial Certification Issue	18
Reporting Violations Issue	19
Raystay Misrepresentation Issue	20
Rehabilitation Submission Issues	21
Construction Issue	22
Conclusion	22

RECEIVED

JUN - 7 1993

INTRODUCTION

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

1. On May 13, 1993, Trinity Broadcasting of Florida, Inc. ("TBF") filed a Motion to Dismiss the application of Glendale Broadcasting Company ("Glendale"). On that date, TBF also filed a Contingent Motion to Enlarge Issues against Glendale.¹ The Mass Media Bureau submits the following consolidated comments.

THE PLEADINGS

MOTION TO DISMISS

2. TBF states that Glendale's application is ungrantable and should be dismissed because Glendale does not have reasonable assurance of the availability of its proposed transmitter site and is barred from amending its application to cure this deficiency. By way of background, Glendale proposes to mount its antenna on an existing tower owned by TAK Broadcasting Corporation ("TAK"). The TAK tower is the same structure on which TBF's antenna for Station WHFT(TV) is now located.

3. According to TBF, on December 9, 1991, shortly before Glendale filed its application, TAK extended a written offer to Glendale to negotiate a new lease for space on the tower in the

¹ The Motion to Enlarge Issues is contingent on disposition of the Motion to Dismiss. See Motion to Enlarge Issues, at p. 1.

event Glendale obtained a construction permit. TAK's offer to Glendale expired, by its own terms, on January 31, 1992. TAK's Tower Manager and Chief Engineer, James L. Sorensen ("Sorensen"), states in an affidavit submitted by TBF that Glendale failed to deliver to TAK an executed acceptance of the written offer by the deadline. Furthermore, according to the Sorensen affidavit, TAK has had no communication of any kind with Glendale since the written offer was sent to Glendale in December 1991. Because Glendale failed to accept TAK's offer, TBF argues that Glendale does not have, and never has had, reasonable assurance of the availability of the TAK tower for its proposed new radio station.

4. TBF also argues that there exists another, independent ground for concluding that Glendale lacks reasonable assurance of the availability of its proposed transmitter site. According to TBF, it is well established that if access to a proposed site will be delayed substantially beyond the date of grant of a construction permit, the site is not available, citing Chicagoland TV Co., 8 RR 2d 758, 760-761 (Rev. Bd. 1966). TBF claims that the facts involving Glendale's proposed transmitter site are directly on point with the Chicagoland decision.

5. TBF argues that even if Glendale had timely accepted TAK's offer to negotiate a lease, the offer provided that the only space on the TAK tower available to Glendale is the space now occupied by TBF. However, TBF states that, pursuant to its

current lease with TAK, TBF may remain on the tower -- and
consequently block Glendale's access thereto -- for up to two

adding ten basic qualifying issues against Glendale, to wit:

(1) To determine (a) whether the submission made in Glendale's application regarding the rehabilitation of George F. Gardner is of sufficient scope and currency to meet the standards for rehabilitation submissions prescribed in RKO General, Inc. (WAXY-FM), [5 FCC Rcd 642 (1990)], and (b) if not, whether Glendale has made an adequate threshold showing that Gardner is currently qualified.

(2) To determine whether Glendale Broadcasting Company is qualified to be a Commission licensee in light of the findings and conclusions concerning misrepresentation and/or lack of candor made against George F. Gardner in MM Docket No. 84-1112 et seq. (RKO General, Inc. (WAXY-FM)).

(3) To determine whether Glendale has made misrepresentations or lacked candor concerning the availability of its proposed transmitter site in violation of Section 73.1015 of the Commission's Rules and, if so, the effect thereof on Glendale's qualifications to be a licensee.

(4) To determine whether there is reasonable assurance that the transmitter site specified by Glendale is available for its proposed use.

(5) To determine whether Glendale falsely certified its financial qualifications in violation of Section 73.1015 of the Commission's Rules and, if so, whether Glendale is qualified to be a licensee.

(6) To determine whether Glendale has violated Section 73.3514 and/or Section 1.65 of the Commission's Rules and, if so, whether Glendale is qualified to be a licensee.

(7) To determine whether Raystay Company has made misrepresentations or lacked candor with the Commission in low power television (LPTV) applications in violation of Section 73.1015 of the Commission's Rules and, if so, the effect thereof on Glendale's qualifications to be a licensee.

(8) To determine whether George F. Gardner made misrepresentations and/or lacked candor in violation of Section 73.1015 of the Commission's Rules in "rehabilitation" statements he made to the Commission in March 1990 and May 1990 and, if so, the effect

thereof on Glendale's qualifications to be a licensee.

(9) To determine whether Glendale made misrepresentations an/or lacked candor in violation of Section 73.1015 of the Commission's Rules in reaffirming the "rehabilitation" statements made by George F. Gardner to the Commission in March 1990 and May 1990 and, if so, the effect thereof on Glendale's qualifications to be a licensee.

(10) To determine the facts and circumstances surrounding the failure of Raystay Company to construct and operate low power television stations of which it has been the permittee and, in light thereof, whether there is reasonable assurance that Glendale Broadcasting Company would timely construct the facility for which it seeks authorization in BPCT-911227KE.

Character Issues

8. TBF urges the Presiding Judge to add Issues (1) and (2) against Glendale based on the adjudicated misconduct of George F. Gardner ("Gardner"). Gardner is Glendale's majority shareholder, President, Secretary, Treasurer, and a Director. In a prior, unrelated proceeding, Gardner was found to have misrepresented material facts to the Commission. As a result, the Commission directed that Gardner's character should henceforth be subject to "heightened scrutiny" in any future case in which he is a participant. The Commission also prescribed that, in any future application, Gardner must establish his good character by demonstrating at a minimum, that: (a) the applicant has not been involved in any significant wrongdoing since the alleged broadcast related misconduct occurred; (2) the applicant enjoys a reputation for good character in the community; and (3)

the applicant intends to undertake meaningful measures to prevent the future occurrence of FCC-related misconduct. RKO General, Inc. (WAXY-FM), 5 FCC Rcd 642, 644 (1990) ("RKO"); see also, Letter of Roy J. Stewart, Dated July 23, 1990, re: LPTV Applications of Raystay Company (determining that Gardner should continue to be subject to "heightened scrutiny").

9. Glendale's captioned application included an exhibit relating to Gardner's character. In that exhibit, Glendale, among other things, reaffirmed the showing that Gardner made to the Commission in 1990 in connection with the filing of several LPTV stations by Gardner-controlled Raystay Company.

10. TBF questions the adequacy of Glendale's exhibit and urges the Presiding Judge to add an issue to determine whether Glendale has satisfied the Commission's concerns about Gardner's fitness to be a Commission licensee. Specifically, TBF argues that the instant exhibit fails to demonstrate that Gardner has followed through on the promises he made to the Commission in 1990. Further, the instant exhibit does not delineate any details about the implementation of the program that Gardner represented in 1990 he would establish to ensure compliance with the Commission's Rules. TBF also urges the Presiding Judge to add an issue to determine whether Glendale is basically qualified, given Gardner's adjudicated misconduct in the RKO case.

Site Availability/Site Certification Issues

11. TBF requests the Presiding Judge to add Issues (3) and (4) against Glendale based on the same facts upon which TBF's Motion to Dismiss is premised. Thus, TBF argues that site availability and site certification issues are warranted against Glendale because Glendale never accepted the TAK tower offer, and, even if it did, Glendale will be prevented from mounting its antenna on the TAK tower for up to two years after the grant of its construction permit becomes final.

Financial Certification Issue

12. TBF requests the Presiding Judge to add Issue (5) against Glendale because Glendale allegedly certified to its financial qualifications in bad faith. Glendale estimates that it will require \$2,169,816 to construct and initially operate its new television station. Glendale's application, as originally filed, contained a commitment by Gardner to lend Glendale all of that amount or \$1,219,839, depending upon whether or not Glendale leased its equipment from a leasing company.²

² Glendale subsequently amended its application on March 26, 1992, to substitute a bank in lieu of Gardner as its source of funding.

13. Although Gardner's loan commitment letter represented that he had more than sufficient assets to meet his obligations to Glendale, the letter specifically acknowledged that Gardner did not have sufficient "net liquid" assets on hand. However, the letter went on to state that Gardner had identified specific unencumbered assets which could be readily sold.

14. TBF argues that the absence in Gardner's loan commitment letter of any reference to appraisals of Gardner's non-liquid assets suggests that Gardner did not obtain such appraisals. TBF argues that without the appraisals, a substantial and material question exists as to the bona fides of Glendale's financial certification. See, e.g., Opal Chadwell, 4 FCC Rcd 1215 (1989) (non-liquid assets will not support an applicant's financial qualifications unless such assets have been independently and professionally appraised, the appraised value is discounted by one-third, current liabilities are subtracted, and the resulting amount is enough to meet the estimated costs).

Reporting Violations Issue

15. TBF requests the Presiding Judge to add Issue (6) against Glendale because Glendale failed to include in its application all information solicited by FCC Form 301, in violation of § 73.3514(a) of the Commission's Rules, and it failed repeatedly to maintain the continuing accuracy of its

application, in violation of § 1.65 of the Commission's Rules.

16. According to TBF, Glendale has never disclosed the existence of any the following nine applications involving LPTV stations controlled by Gardner:

- (a) Application for first extension of CP of LPTV Station W31AX, Lancaster, Pa. (File No. BMPTTL-911220JB).
- (b) Application for first extension of CP of LPTV Station W23AW, Lancaster, Pa. (File No. BMPTTL-911220IX).
- (c) Application for first extension of CP of LPTV Station W55BP, Lebanon, Pa. (File No. BMPTTL-911220JI).
- (d) Application for first extension of CP of LPTV Station W38BE, Lebanon, Pa. (File NO. BMPTTL-911220JF).
- (e) Application for second extension of CP of LPTV Station W31AX, Lancaster, Pa. (File No. BMPTTL-920709IN).
- (f) Application for second extension of CP of LPTV Station W23AW, Lancaster, Pa. (File No. BMPTTL-920709IM).
- (g) Application for second extension of CP of LPTV Station W55BP, Lebanon, Pa. (File No. BMPTTL-920709IJ).
- (h) Application for second extension of CP of LPTV Station W38BE, Lebanon, Pa. (File No. BMPTTL-920709IK).
- (i) Application for second extension of CP of LPTV Station W40AF, Dillsburg, Pa. (File No. BMPTTL-930127AK).

According to TBF, LPTV applications (a) through (d) were pending at the time the captioned application was filed, but were never reported. TBF argues that their omission from Glendale's application violated § 73.3514(a). The remaining five LPTV

applications, (e) through (i), were filed with the Commission after the captioned application was already pending. TBF argues that Glendale's failure to report them by amendment constituted a violation of § 1.65.

17. TBF further argues that Glendale failed to report the disposition of eight of the LPTV applications. According to TBF, LPTV applications (a) through (d) were granted on January 29, 1992, and LPTV applications (e) through (h) were granted on September 23, 1992. TBF claims that Glendale reported none of the eight Commission actions, in violation of § 1.65.

18. TBF also argues that although Glendale reported the filing of an application for consent to the assignment of the construction permit of LPTV Station W23AY, York, Pa., from Gardner-controlled Raystay Company to GroSat Broadcasting, Inc. (File No. BAPTTL-920114IB), it never reported by amendment to the captioned application the Commission's grant of the assignment. Nor did Glendale, according to TBF, report consummation of the sale of the LPTV facility.

19. TBF further claims that Glendale yet again violated § 1.65 by not reporting for more than a year after the fact that it had filed an application challenging the license renewal of Station WHSG(TV), Monroe, Georgia (File No. BPCT-920228KE).

Raystay Misrepresentation Issue

20. TBF requests the Presiding Judge to add Issue (7) against Glendale based on misrepresentations allegedly committed by Gardner-controlled Raystay Corporation in connection with Raystay's construction permits for four LPTV stations at Lancaster and Lebanon, Pa. See ¶ 16, above. By way of background, Raystay proposed to locate the antennas for its two Lancaster LPTV stations atop a building owned by a cement company. Raystay proposed to locate the antennas for its two Lebanon LPTV stations atop a hotel. The Commission granted the four applications and twice extended each of the construction permits.

21. TBF argues that Gardner certified to the availability of the transmitter sites in the four construction permit applications without having first obtained the requisite reasonable assurance. Furthermore, in seeking to justify extensions of time within which to construct the four stations, Raystay made misrepresentations in all eight of its extension applications about the status of the proposed sites and steps taken toward construction.

22. In support, TBF provides affidavits from the contact persons for the two proposed transmitter sites. Each individual indicates that Raystay procured his consent to use the site for

antenna structures which differed markedly in size and weight from the structures specified in the Raystay applications.

23. TBF argues that because Raystay withheld material information from each of the site owners about the true magnitude of the proposed facility, neither site owner provided the level of informed consent which would support a good faith certification by Raystay. Accordingly, TBF urges the Presiding Judge to add an issue to determine whether Raystay committed misrepresentations when it certified to the availability of the sites.

24. TBF further maintains that Raystay continued the deception after receiving the four construction permits. According to TBF, Raystay obtained eight extensions of time within which to construct the LPTV stations by misrepresenting the extent and diligence of its efforts toward constructing the four LPTV stations. Affidavits submitted by TBF allege that, contrary to Raystay's claims, no one from Raystay sought to negotiate use of the sites proposed in the LPTV applications.

Rehabilitation Submission Issues

25. TBF requests the Presiding Judge to add Issues (8) and

ultimately cancelled for non-construction), a substantial and material question is raised as to whether Glendale has any bona fide intention of actually constructing a Miami TV station in the event it is successful in the instant proceeding.

FCC 93-196 (released April 21, 1993); Goodlettsville Broadcasting Company, Inc., 5 FCC Rcd 4593, 4594 (1990); and Shoblom Broadcasting, Inc., 95 FCC 2d 444 (Rev. Bd. 1983), rev. denied, FCC 84-119 (1984), aff'd sub nom. Royce International Broadcasting Co. v. FCC, 762 F.2d 138 (D.C. Cir.), cert. denied, 106 S.Ct. 410 (1985).

30. Accordingly, absent the submission of evidence showing that Glendale timely accepted the TAK offer, the Bureau supports TBF's request to dismiss the Glendale application. This support is based solely on the representations by TBF that Glendale did not timely accept the TAK tower offer.

31. The Bureau does not agree with TBF that the Glendale application should be dismissed even if Glendale timely accepted the TAK tower offer. TBF argues that its current lease with TAK contains a provision which arguably would allow TBF to remain on the TAK tower and thus block Glendale's access for up to two years after a grant to Glendale. TBF maintains that such a lack of access to Glendale's proposed transmitter site eliminates any claim of reasonable assurance. The Bureau submits that an interpretation of the terms of TBF's lease with TAK is a matter requiring a determination by a state court of competent jurisdiction, not the Commission.

Contingent Motion to Enlarge Issues

Character Issues

32. The Bureau opposes addition of Issues (1) and (2) against Glendale. TBF argues that Gardner's rehabilitation exhibit is inadequate because it essentially incorporated by reference the same submission Gardner made in 1990 in connection with his LPTV applications.

33. In Letter of Roy J. Stewart, Dated July 23, 1990, re: LPTV Applications of Raystay Company, the Chief, Mass Media Bureau, determined that Gardner's rehabilitation submission satisfied the Commission's concerns about Gardner's character. Although the Chief, Mass Media Bureau, granted the LPTV applications, he directed that Gardner's fitness to be a

35. Furthermore, it is clear from the Hearing Designation Order, 8 FCC Rcd 2475 (1993) ("HDO"), that the Commission considered the adequacy of Gardner's rehabilitation exhibit. Thus, at ¶ 47 of the HDO, the Commission stated that "[e]xcept as indicated by the issues specified below, the applicants are qualified." This language constitutes an affirmative representation that the Commission thoroughly reviewed the Glendale application and determined that, but for the issues specified in the HDO, Glendale (and by implication, Gardner) is basically qualified. Since no character issue was specified against Glendale or Gardner in the HDO, it is plain that Gardner satisfactorily carried out his obligations pursuant to the RKO case. Accordingly, no issues stemming from Gardner's misconduct in the RKO case are warranted against Glendale.

Site Availability/Site Certification Issues

36. The Bureau's conditionally opposes addition of Issues (3) and (4). As noted above, the Bureau supports dismissal of Glendale's application if it is shown that Glendale never possessed reasonable assurance of the availability of the TAK tower for its proposed antenna. If a question exists as to whether Glendale's acceptance of the TAK offer was valid, then a site available issue is warranted. However, if Glendale shows that it timely accepted TAK's offer, then the addition of the requested site availability and site certification issues plainly

would not be warranted.

Financial Certification Issue

37. The Bureau opposes addition of Issue (5) against
Clendale as framed. However, the Bureau does support addition

Gardner's loan commitment letter is simply a vague recitation of his willingness to sell certain, unidentified non-liquid assets he owns to cover the loan commitment. On the critical matter of appraisals the letter is conspicuously silent. Because of the absence of any reference in Gardner's loan commitment letter to appraisals of his non-liquid assets, a substantial and material question is raised, warranting further exploration at hearing, as to whether Glendale is financially qualified. However, in light of the fact that Gardner disclosed his shortcomings in the application, there does not appear to be any intent to deceive the Commission. Accordingly, a financial qualifications issue, not a financial certification issue, should be added against Glendale.

Reporting Violations Issue

40. The Bureau supports addition of Issue (6) which seeks a Section 1.65 and a Section 73.3514(a) reporting issue against Glendale. These rule sections require an applicant to report

failed to report required information in the captioned application or failed to update the application with current information. The sheer breadth of the alleged violations raises a substantial and material question as to whether Glendale was excessively careless and inattentive in fulfilling its reporting responsibilities. Accordingly, a basic qualifying issue is warranted to determine whether Glendale repeatedly violated §§ 1.65 and 73.3514(a) of the Commission's Rules.

Raystay Misrepresentation Issue

42. The Bureau supports addition of Issue (7) against Glendale. Based on the affidavits from the two site owners, the Bureau is satisfied that TBF has established a prima facie case of misrepresentation by Gardner-controlled Raystay Company in connection with the transmitter site certifications contained in four LPTV applications. Also, TBF has established a prima facie case of misrepresentation by Raystay in connection with requests for extension of time within which to complete construction of the LPTV facilities.

43. TBF has raised material and substantial questions, requiring further exploration at hearing, as to whether Raystay certified in good faith to having reasonable assurance of the availability of the two LPTV sites. It appears that the site owners did not give Raystay consent to build the antenna

structures which Raystay proposed in its applications. To the contrary, the site owners categorically state that the consent they conveyed to Raystay was for structures which were considerably more modest in size and weight. As a consequence, it is doubtful that Raystay ever had reasonable assurance to use the sites for its intended purpose.

44. Similarly, TBF has called into question the representations that Raystay made to the Commission in its multiple requests for extensions of time to build the LPTV stations. In each case, it appears that Raystay misstated the nature and extent of construction as well as conversations with the site owners. Absent an appropriate explanation, this matter warrants further examination at hearing.

Rehabilitation Submission Issues

45. The Bureau opposes addition of Issues (8) and (9) against Glendale which seek inquiry into whether misrepresentations were made in Gardner's rehabilitation statements. The Bureau believes that TBF has not demonstrated, as it must, an intent to deceive on the part of Gardner or Glendale. Moreover, the Bureau supports addition of other issues in this proceeding which will shed light on the matters which form the basis for the alleged misrepresentations in the rehabilitation statements. Consequently, addition of Issues (8)

and (9) would be unnecessarily duplicative.

Construction Issue

46. The Bureau opposes addition of Issue (10) against Glendale because it is unsupported and frivolous. TBF essentially alleges that Glendale's application was filed for a purpose other than constructing a new full-power TV station in Miami. However, TBF does not provide any support for questioning the bona fides of Glendale's application other than the fact that Glendale's controlling principal failed to construct several LPTV stations for another company he controlled. Merely because Raystay failed to construct four LPTV stations does not necessarily mean that Glendale will not build its proposed Miami facility.

CONCLUSION

47. Based on the foregoing, the Bureau supports addition of Issues (5), as modified, (6), and (7) against Glendale. The Bureau opposes addition of Issues (1) through (4) and (8) through (10). Furthermore, with respect to the added issues, the Bureau agrees that Raystay and Gardner should be made parties and that their respective liabilities for forfeiture should be resolved in